89-509

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-1507

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GERALDINE WALMSLEY, Administratrix of the Estate of THOMAS D. WALMSLEY, DECEASED, and on her own behalf,

Respondent

v.

THE CITY OF PHILADELPHIA and GREGORY SAMBOR and KEVIN TUCKER, Police Commissioners of the City of Philadelphia, and Police Officer John Doe and other unknown and unnamed officers and agents of the City of Philadelphia Police Department, individually and in their capacity as officers of the City of Philadelphia, Police Officer Ernest Colwell, Badge #7202, Police Officer Michael Valenti, Badge #2268, Police Lt. Augustine Carre, Badge #98,

Petitioners

v.

ROBERT WALMSLEY,

Respondent

Third-Party Defendant

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Civil Action No. 88-1507 reversing the order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-5812, granting Petitioners' motion for a directed verdict.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF POLICE OFFICER ERNEST COLWELL, BADGE #7202 AND POLICE OFFICER MICHAEL VALENTI, BADGE #2268

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit Court of Appeals properly reversed the District Court's grant of a directed verdict on the plaintiff's claims that defendants Colwell and Valenti used excessive force when arresting Thomas Walmsley and were deliberately indifferent to his serious medical conditions in violation of his civil rights?

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COUNTER STATEMENT OF THE CASE

Plaintiff adopts and incorporates the Court of Appeals' recitation of the facts which are set forth in Petitioner's Petition on pages A-8 through A-14.

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit reversed the District Court's Directed Verdict in favor of Petitioner-Defendants because evidence presented by the Respondent-Plaintiff at trial made out claims against Petitioner-Defendants for excessive force and deliberate indifference to the serious medical condition of plaintiff's decedent. The instant Petition for Writ of Certiorari should be denied because this appeal involves only the issue of whether the plaintiff presented sufficient evidence from which a reasonable jury could infer that defendants Colwell and Valenti used excessive force in arresting the decedent. The only inquiry raised in this petition goes to the substantiality of the evidence and, accordingly, no issue of importance to the public or conflict of opinion among circuits exists.

ARGUMENT

In reviewing the District Court's directed verdict, the Third Circuit utilized the same standard applied by the lower court. When deciding a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, and deny a defendant's motion "if there is evidence reasonably tending to support the recovery by plaintiff as to any of its theories of liability." *Flynn v. Bass Bros. Enters, Inc.*, 744 F. 2d 978, 983 (3d Cir. 1984) quoting *Dougherty v. Hooker Chemical Corp.*, 540 F. 2d 174, 178 (3d. Cir. 1976). However, a district court's grant of a directed verdict should be upheld if "without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." *Id.* quoting *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943).

It is clear from the opinion of the Court of Appeals that sufficient evidence was presented by the plaintiff for the case to go to a jury on the issues of excessive force and deliberate indifference to a serious medical condition with respect to Officers Colwell and Valenti.

The instant Petition for Writ of Certiorari is merely a delaying tactic on the part of the Petitioners. Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the court of appeals. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). The Third Circuit opinion in the instant action *Walmsley v. The City of Philadelphia*, 872 F.2d. 546 (3d Cir. 1989) (reh'g denied) clearly shows that the issue before this Court is strictly one of a factual nature involving only the individual parties. The question at hand and below was whether the facts presented by plaintiff, under the

applicable legal standards[1], present enough evidence to reach a jury. It is well settled that the Supreme Court will not grant a Writ of Certiorari merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175 (1938).

Moreover, even if an important federal question was preserved and presented to the Court by Petitioner, this Court has refused to make an independent review of the review by the court of appeals with regard to the issue of substantiality of evidence supporting an order.

> The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantility, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> *This is not the place to review a conflict to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony . . .*
>
> In such situations we should "adhere to the usual rule of noninterference where conclusions of Circuit Court of Appeals depend on appreciation of circumstances which admit in different interpretations." *Federal Trade Com. v. American Tobacco Co.,* 274 U.S. 543, 544, 71 L Ed. 1193, 1194, 47 S. Ct.

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1. Neither Petitioner or Respondent have challenged the legal standards applied to the facts. Only the substantiality of the evidence is in dispute here.

663. *National Labor Relations Board v. Pittsburgh S.S. Co., supra.*, 340 U.S. at 502-503. (Emphasis Added)

The factual issue presented by Petitioner is of little importance to the public and involves no conflict of opinion. Accordingly, Petitioner's Writ for Certiorari should be denied.

Conclusion

For the foregoing reasons, Respondent respectfully requests this Honorable Court deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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BY:_____
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